

# Provisional (And Extraordinary) Measures in the Name of the Rule of Law

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The showdown was inevitable. At some point, the Court of Justice had to show its teeth and remind the Polish government of its duty to comply with the rule of law and with the values enshrined in Article 2 TEU. For the Member States of the EU, the rule of law is not an option. You either take it or leave it (and thus leave the EU). However, Poland's late attitude towards EU integration, happily accepting the money from EU funds but showing its back on the fundamental values of the EU, was inevitably going to be confronted, sooner or later, at the Court of Justice.

If the showdown was predictable, the surprise has been that it has all happened so quickly, so frontally and... in interim relief procedures in an infringement action against Poland.

The showdown, or the latest one so far, took place last Monday, on 20 November, when the Court of Justice, in an exceptional Grand Chamber formation, granted interim relief requested by the Commission and, for the first time, declared its jurisdiction to impose penalty payments in such procedures. A first in the history of EU law.

The facts are rather straight-forward. The Polish authorities ordered a series of measures with the aim of protecting the security in the Białowieża forest, one of the Natura 2000 sites and Poland's most valued forest park. The initiative would entail cutting down approximately 180.000 cubic meters of forest, in an area that is the home of Europe's largest mammal and forest trees. The Commission did not believe that the initiative was simply a measure to protect hikers from branches falling off the trees. An ambitious planning project was discretely under way too.

On 27 July 2017, the Vice-President of the Court of Justice granted provisional measures prior to holding a hearing in the interim relief procedures. Nevertheless, the works in Białowieża continued. The Order of the Vice-President was ignored.

On 11 September 2017, the hearing in the provisional measures procedure took place. In the course of such hearing, the Commission highlighted the fact that the Vice-President's Order granting interim relief had been ignored. After a heated discussion, the Commission suggested that the Court should impose penalty payments on the defendant as long as it carried on disregarding the decisions of the Court of Justice. A few days later, the Commission submitted in writing a formal request for the imposition of penalty payments in case the Polish authorities continued to ignore the Court's orders.

To the surprise of those who were not following the proceedings closely (as was my case), on 20 November 2017 the Court of Justice startled its readers by rendering an Order in Grand Chamber, without having held another hearing, granting the Commission's request of interim relief as well as the penalty payment. The Order considers the option of imposing penalty payments in interim relief procedures, a possibility that is only explicitly envisaged in Article 260 TFEU for the case of non-enforcement of judgments in infringement procedures. Quite effortlessly, the Court of Justice draws a parallelism between Article 260 TFEU and the general provision on interim relief in Article 279 TFEU, and comes to the conclusion that the purpose of interim relief is to ensure the outcome of the procedure, whatever the final decision on the substance might be. Quite rightly (in my opinion, at least) the Order declares the Court's jurisdiction to impose penalty payments under Article 279 TFEU proceedings (proceedings which are accessory to the infringement procedures that could eventually lead to an Article 260 TFEU penalty payment).

There are two points in the Order that I find particularly interesting.

First, the way in which the Court of Justice handles this new power is quite nuanced and clever. It does not

impose the penalty payment in concreto, only in abstracto. After considering the facts, the Order imposes at least a 100.000 euro/day penalty payment in case that the Polish authorities continue to ignore the decision of the Court. But it is for the Commission to ascertain, in a period of time granted by the Court, whether such conduct still persists. This is a smart move on the part of the Court, with a typical stick and carrot approach to a sensitive dossier. In addition, the Court has bought the Polish government's argument on the need to protect pedestrians from the fall of heavy branches and trees, and thus the Order allows measures that are strictly necessary to achieve the goal of protecting the security of the premises. It is for the Commission, not the Polish government, to monitor the measures and report to the Court.

But the most interesting point of the Order is cleverly hidden in paragraph 102. At the very end of the passage, shortly after considering the fact that the Vice-President's Order was ignored by the Polish authorities, the Court of Justice adds:

"Indeed, the power to enforce upon a Member State the provisional measures enacted by the judge in interim relief procedures, with the faculty to impose a penalty payment in case of non-compliance, is intended to guarantee the effective application of Union law, which is an inherent value of the rule of law enshrined in Article 2 TEU, upon which the Union is founded" (my own translation).

For the first time, the Court of Justice has shown its teeth in the Polish crisis, and it has done so pointing very subtly to the nuclear option. So far, the messages were nuanced, in public or even in private. The Court of Justice would not tolerate attacks on the rule of law and on national courts, or so was the narrative when judges of the Court were asked in academic conferences or in public speeches. These comments were usually a reaction to the news about domestic measures in some Member States, in which national courts or officials were targeted by populist governments in the name of "the people". But now it is for the Court of Justice to witness how it is the victim itself of an attack on the rule of law. Constitutional Courts were being ignored in some Member States (Poland, Spain...), and then came the turn of the Court of Justice.

The reaction from Luxembourg has not taken long. By September of 2017 it was obvious that the Polish government was ignoring the ruling of the Court rendered in July. Two months later, in Grand Chamber, the Court of Justice has sent the strongest possible message, in an interim relief procedure and creating, in an innovative but (in my opinion) convincing way, pecuniary tools to make sure that the measure takes a painful bite from the Polish budget. At the same time, the Court has hinted at the tools that Article 2 TEU can provide, for the time being on a provisional basis. Who knows what other jurisdictional instruments could this provision grant if the State's misconduct continues.

Article 2 TEU is now starting to take shape as a relevant normative utensil in the Court of Justice's toolbox. The first time it has shown its teeth it has allowed the Court to reinvent provisional measures in the name of the rule of law. The next time it is used again, I wonder what surprise the Court is willing to share with us... in the name of the rule of law.

The courageous Court of Justice, the creative but fair and balanced jurisdiction that was so deeply missed in the humanitarian visa case, is back in business again. Hopefully it is here to stay.

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